IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER HENRY DERAGON,

Petitioner, No. CIV S-02-0526 MCE JFM P

vs.

EDWARD S. ALAMEIDA, JR., et al.,

Respondents. FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1997 conviction on charges of robbery and first degree murder with use of a firearm. He seeks relief on the grounds that: (1) his confession was involuntary and coerced, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and (2) his rights to due process and to present a defense were violated by the use of erroneous jury instructions. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied.

PROCEDURAL BACKGROUND

On May 13, 1997, a complaint was filed in the Sacramento Superior and Municipal Court charging petitioner and co-defendant Angelo Garcia with murder by use of a

firearm, in violation of Cal. Penal Code §§ 187(a) and 12022.5(a), with a special circumstance allegation that the murder was committed while petitioner was engaged in the commission or attempted commission of the crime of robbery, within the meaning of Cal. Penal Code § 190.2(a)(17) (count one); and (2) robbery by use of a firearm, in violation of Cal. Penal Code §§ 211 and 12022.5(a) (count two). (Clerk's Transcript on Appeal (CT) at 9-11.)

On July 24, 1997, prior to the start of trial, the trial court denied petitioner's motion to suppress statements he made to police investigators. (Reporter's Transcript on Appeal (RT) at 18.) After a jury trial, with separate juries for petitioner and co-defendant Garcia, petitioner was convicted of one count of first degree murder with personal use of a firearm and one count of robbery with personal use of a firearm. (CT at 244-45.) The special circumstance was found to be not true. (Id.) On October 10, 1997, the trial court sentenced petitioner to an aggregate prison term of 26 years-to-life in state prison. (Id. at 274.)

Petitioner filed a timely notice of appeal. (Id. at 277.) Petitioner's conviction was affirmed by the California Court of Appeal for the Third Appellate District in an unpublished decision dated December 19, 2000. (Answer, Ex. D.) On January 2, 2001, petitioner filed a petition for rehearing in the California Supreme Court. (Answer, Ex. E.) That petition was denied in a reasoned decision dated January 12, 2001. (Answer, Ex. F.) On January 24, 2001, petitioner filed a petition for review in the California Supreme Court. (Answer, Ex. G.) That petition was summarily denied by order dated March 28, 2001. (Answer, Ex. H.)

FACTUAL BACKGROUND[1]

> [Petitioner] participated with his friend, Angelo Garcia, in a plan to rob 17-year-old Eric Hesterlee, a marijuana dealer. [Petitioner] arranged for the victim to meet him at a schoolyard on the pretext that [petitioner] wanted to purchase a pound of marijuana. The plan was for Garcia to enter the schoolyard by a different route in order to take the victim, and supposedly [petitioner], by surprise.

[1] The following summary is drawn from the December 19, 2000, opinion by the California Court of Appeal for the Third Appellate District (hereinafter Opinion), at pgs. 2-3, filed on March 3, 2003, as Exhibit D to Respondents' answer.

> Garcia would pretend to rob both [petitioner] and the victim and, in that manner, obtain the victim's marijuana and perhaps other things of value. To make the charade more convincing, [petitioner] made a phony "wad" by wrapping some money around a roll of cut up newspaper. He planned to give the phony money roll to Garcia to convince the victim that [petitioner] also was being robbed.
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> At the appointed time, [petitioner] met the victim and walked with him into the schoolyard. Garcia entered the schoolyard from a different direction, while leaving his friend, Randy Bettencourt, in Garcia's car with the engine running. Garcia put on a mask and, holding a pistol, accosted [petitioner] and the victim. [Petitioner] put on what he later described as a "four-star," Oscar-winning performance, pretending to resist but ultimately giving Garcia the phony roll of money. Garcia demanded and obtained the victim's marijuana. When Garcia demanded the victim's car keys, the victim attempted to resist. Garcia fired three shots, two of which struck and killed the victim.
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> During the encounter, some of the victim's marijuana spilled onto the ground. Garcia took the remaining marijuana and fled to his car. Soon after the shooting, officers stopped the car a short distance from the scene of the crime. On his person, Garcia had the marijuana and phony roll of money. The murder weapon was on the floorboard of his car.
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> [Petitioner] fled the crime scene separately. In an interview the following morning, he disclosed his role in the crime. He was arrested several days later.

(People v. Deragon, slip op. at 2-3.)

ANALYSIS

I. Standards for a Writ of Habeas Corpus

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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Under section 2254(d)(1), a state court decision is "contrary to" clearly established United States Supreme Court precedents "if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases', or if it 'confronts a set of facts that are materially indistinguishable from a decision'" of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 573 U.S. 3, 8 (2002) (quoting Williams v. Taylor, 529 U.S. 362, 405-406 (2000)).

Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. Williams, 529 U.S. at 413. A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' that the state court was 'erroneous.'")

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

II. Petitioner's Claims

A. Petitioner's Confession

Petitioner's first claim is that his federal constitutional rights were violated when the trial court denied his motion to suppress his statement to police interrogators. This claim is based on several grounds. First, petitioner contends that his statements were obtained during custodial interrogation in violation of his rights pursuant to Miranda v. Arizona, 384 U.S. 436

(1966). Second, petitioner argues that his statements given after Miranda warnings constituted an invocation of his rights to counsel and to remain silent that were not honored by the police. Last, petitioner contends that he did not knowingly and voluntarily waive his rights to counsel and to remain silent.

The California Court of Appeal fairly described the facts surrounding this claim as follows:[2]

> On the morning after the crime, detectives went to [petitioner's] house and spoke with him and his parents. When [petitioner] revealed his participation in the scheme, the detectives decided to take him to the station where they conducted a videotaped interview. [Petitioner] was not under arrest at the time; he was permitted to return home after the interview, and was not arrested until several days later. At trial, the videotape of the interview was shown to [petitioner's] jury.
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> During the early portion of the interview, the following exchange occurred between Detective Fancher and [petitioner]:
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> "FANCHER: Okay, Um – before I get into this, we got – we're gonna go over a formality, and you've probably watched it on TV to where – um – you've heard of your rights? [¶] [PETITIONER]: Yeah. [¶] FANCHER: Everyone says, ah you – you know, should have advised – advised me of my rights. Well, that's what this is. All right. It's called a Miranda warning. Before we get into all this detailed stuff, I'm just gonna go over this with you."
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> Fancher then read the Miranda rights, and [petitioner] said he understood them. [Petitioner] checked and initialed each of the rights on a written waiver form.
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> When Fancher asked whether he wished to talk, [petitioner] said: "I mean, I do, but I don't want to – I don't want none of this to come back to me in court. I don't want to go to jail over none of this." Fancher reminded him that, at his parents' house, [petitioner] had given detectives a "crash course" concerning what had happened. Fancher indicated he was going to document [petitioner's] statement, along with the statements of others, and would compile a report to submit to the district attorney. He told [petitioner] that it would be up to the district attorney's office to decide what to do with the information. Fancher emphasized: "I

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[2] In reviewing petitioner's claims, this court reviews the "last reasoned decision" by the state court, which in this case is the California Court of Appeal's denial of petitioner's direct appeal. Robinson v. Ygnacio, 360 F.3d 1044, 1055 (9th Cir. 2004.)

> don't know what's gonna happen, and neither does Ron [Detective Garverick]."
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> At this point, Detective Garverick said: "You're not gettin' arrested today," and reminded [petitioner] he already had been told that. [Petitioner] replied: "Yeah. I know this. I know that I'm not goin' to jail today. It's just when this – when all this comes out, it's like am I gonna get brought into this and get sent to jail for – [¶] . . . [¶] – conspiracy or just like . . [?]" Fancher repeatedly told [petitioner] that the detectives did not know.
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> [Petitioner] then said: "Do I want to have a lawyer present? I mean, that's what I – it's like that's what I want to know. Do I need – ." After acknowledging that he had talked to the detectives at his house, [petitioner] said "all right" and signed the form waiving his Miranda rights.
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> The detectives then reiterated that they did not know what would happen to [petitioner] if he agreed to answer their questions. [Petitioner] responded: "I don't want to know what's gonna happen, but – I – I just kind of want to be kind of reassured that it's not – this ain't gonna come back on me, I'm gonna go to jail forever, you know, along with this – along with Angelo for doin' this (unintelligible)." When Fancher stated he did not know, [petitioner] said: "All right." Fancher commented: "What can I say? You know. We're – we're gonna – what we're gonna do is try to find the truth of what happened, and – ah – talk to as many people as we can to find that out and then submit it to the D.A., and where it falls from there it's gonna be up to them. Okay?" [Petitioner] then proceeded to answer the detectives' questions.

(Opinion at 3-5.)

In Miranda v. Arizona, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during "custodial interrogation" without a prior warning. 384 U.S. at 444. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. Whether a suspect is "in custody" for purposes of Miranda is an objective test. Yarborough v. Alvarado, 541 U.S. 652, 662-63 (2004). Two inquiries are necessary for a determination of an individual's "in custody" status: (1) the overall circumstances surrounding the interrogation; and (2) given those circumstances, whether a reasonable person in the suspect's situation would have

felt free to terminate the interrogation and leave. Id. See also Stansbury v. California, 511 U.S. 318, 322 (1994) ("the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest") (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (custody must be determined based on a how a reasonable person in the suspect's situation would perceive his circumstances and "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time"). The protections provided by Miranda attach only when an individual is both in custody and being interrogated. See McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991) ("We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than 'custodial interrogation'"); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that an accused has the right to have counsel present during custodial interrogation).

The state appellate court concluded that petitioner was not in custody when he answered the detectives' questions at the police station and, therefore, "Miranda and it's progeny do not apply to him." (Opinion at 9.) The court reasoned as follows:

> All three participants in the videotaped interview expressly stated their understanding that [petitioner] would not be arrested that day – the detectives previously had told [petitioner] he would not be arrested that day; they reiterated this assurance while they interviewed him; and [petitioner] acknowledged he knew he would not be arrested that day. This was no subterfuge for the record. At the conclusion of the interview, the detectives took [petitioner] home as they had promised. He was not arrested for several days thereafter.
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> The question of custody was not litigated further because, in moving to suppress the statements, defense counsel essentially conceded that [petitioner] was not in custody during the interview – in defense counsel's words, "it appears clear that and from the statements in the police report as to [petitioner's] first statement taken in his home and the later statement at the police station approximately an hour or so later, that he was not under arrest and, in fact, was returned home by the Sheriff's office, Sheriff's Department." Consequently, the suppression motion was determined solely on the basis of the transcript of the interview.

> Having watched the videotaped interview in which [petitioner] admitted to the detectives that he was involved in the incident which resulted in the victim's death, we conclude that a reasonable person in [petitioner's] position would have believed, as [petitioner] did, that he was not in custody. [Petitioner] was not placed in handcuffs or any other bodily restraint, and he was left alone on several occasions. The detectives acted in a very low-key, nonconfrontational manner. And they advised [petitioner] that he was not in custody, that he had the right to refuse to answer their questions, that he would be taken home after the interview, and that it was up to the district attorney's office to decide what would happen to [petitioner] if he answered the detectives' questions.
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> [Petitioner] argues that the fact the detectives advised him of his Miranda rights is an indication he was in custody. But, as [petitioner] appropriately notes, an officer's uncommunicated knowledge or belief in the need for a Miranda advisement is not a relevant factor in resolving the question of custody. (People v. Stansbury, supra, 9 Cal.4th at page 830, fn. 1.) Nonetheless, [petitioner] asserts that a reading of the Miranda rights would affect how a reasonable person would understand his position.
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> While we agree that, in some situations, a formal advisement of Miranda rights might indicate to a reasonable person that he has been arrested, we decline to adopt a blanket rule that an advisement of rights establishes custody. Such a rule would be contrary to the established principle that the totality of the circumstances must be considered and no one factor is dispositive. (See People v. Boyer (1989) 48 Cal.3d 247, 272; disapproved on another point in People v. Stansbury, supra, 9 Cal.4th at page 830, fn. 1.) Moreover, it would be bad policy in that it would serve to dissuade officers from giving an advisement unless and until they intend to make an immediate arrest. This would be contrary to the United States Supreme Court's observation that police officers are free to follow procedures that are more protective of a suspect's rights than the minimum dictates of the Constitution. (McNeil v. Wisconsin, supra, 501 U.S. at pp. 181-182 [115 L.Ed. 2d at pp. 171-171].)
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> Here, in view of the express acknowledgment by all three participants in the interview that [petitioner] was not going to be arrested that day, and in light of the other circumstances we have noted above, the reading of Miranda rights does not establish that [petitioner] was in custody or that a reasonable person in his position would have believed he was in custody. Rather, viewed objectively, the totality of the circumstances leads to the conclusion that [petitioner] was not in custody when he spoke with the detectives.

(Id. at 7-9.)

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Petitioner argues that he was in custody during the police interrogation because: (1) he was only 18 years old at the time of the questioning; (2) he was taken from his parents' home to the police station at 6:00 a.m. and was put in a windowless interrogation room; (3) at the police station, petitioner's "freedom of movement was restricted for at least 10 minutes;" and (4) he received Miranda warnings. (Separate Memorandum in Support of Petition for Writ of Habeas Corpus (Memo) at 17-19.) Petitioner argues, "a reasonable 18 year-old high school student in petitioner's position would have felt completely at the mercy of the police, and would not have believed he was at liberty to terminate the interrogation and, without the detectives permission, walk out of the closed-door interrogation room and leave the Sheriff's station (without a car)." (Id. at 19.) Petitioner notes that, while detectives informed him that they would take him home after the interview, they told him this after the interview took place and they made him wait for thirty minutes for a ride.

Although the factors mentioned by petitioner, including the fact that he received Miranda warnings, arguably weigh in favor of a determination that petitioner was in custody, the court of appeal's decision to the contrary was not objectively unreasonable in light of the other factors, described by that court, militating against a finding of custody.[3] See Yarborough, 541 U.S. at 2149-50 (holding that the state court's application of the custody test was reasonable despite "differing indications"); Beheler, 463 U.S. at 1124-25 (suspect not "in custody" where he called the police and told them at the crime scene that his friend had killed the victim, then voluntarily agreed to accompany police to the station house after being told he was not under arrest, and was allowed to return home after the interview); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (it was "clear" the petitioner was not "in custody" where he came voluntarily to the police station, was immediately informed that he was not under arrest, and at the close of the

[3] Although the videotape of petitioner's police interrogation has not been lodged with this court, the appellate court's factual findings are presumed correct and have not been rebutted by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1).

police interview he left the police station without hindrance). Petitioner's complaints that the interview took place in a "windowless" interrogation room behind closed doors are not dispositive of the custody question. See Beheler, 463 U.S. at 1125 ("we have explicitly recognized that Miranda warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect"). Nor is the fact that petitioner was given his Miranda warnings. United States v. Bautista, 145 F.3d 1140, 1147 (9th Cir. 1998) (the reading of the Miranda warning to a suspect does not create a custodial interrogation). Further, although petitioner had to wait for thirty minutes before being driven home after the interview, a reasonable wait was to be expected, and petitioner knew all along that he would not be going to jail that day and was not under arrest. Considering all of the circumstances as a whole, the conclusion of the California courts that petitioner was not "in custody" is not an unreasonable application of federal law. Accordingly, it should not be set aside.[4]

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[4] In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court addressed the admissibility of a confession obtained after a Miranda warning but preceded by the suspect's earlier, unwarned incriminating statements. The court held that a trial court must suppress a confession obtained after a Miranda warning if it was obtained during a deliberate "twostep" interrogation where the police deliberately withheld the Miranda warning until the suspect confessed, followed by a Miranda warning and a repetition of the confession previously given. Id. at 604. The holding in Seibert has been summarized by the United States Court of Appeals for the Ninth Circuit as follows:

> In sum, when a law enforcement officer interrogates a suspect but does not give a Miranda warning until after obtaining a confession or an incriminating statement, a court in deciding whether to suppress a subsequent postwarning confession must determine whether the warning was deliberately withheld. The court should consider any objective evidence or available expressions of subjective intent suggesting that the officer acted deliberately to undermine and obscure the warning's meaning and effect.

United States v. Williams, ___ F.3d ___, 2006 WL 213852 (C.A. 9 (Cal.)) at *9. Seibert followed the decision in Oregon v. Elstad, in which the Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." 470 U.S. 298, 318 (1985).

As noted by the California Court of Appeal, a finding that petitioner was not "in custody" during the police interrogation, "alone is sufficient to reject his claim that the interview should have been suppressed." (Opinion at 9.) This is because Miranda dealt with an individual's Fifth and Fourteenth Amendment right to be free from compelled self-incrimination in the context of custodial interrogations. "Absent either a custodial situation or official interrogation, Miranda and Edwards are not implicated." Bautista, 145 F.3d at 1147. Accordingly, if petitioner was not in custody during the questioning, then his attempts to invoke his right to remain silent and his Miranda right to counsel were ineffective.

Notwithstanding the issue of petitioner's custody status, the California Court of Appeal rejected petitioner's claims that he invoked his rights to remain silent and to counsel, and that his confession was involuntary. The court reasoned as follows:

> In any event, [petitioner's] equivocal statements at the beginning of the interview, indicating he was unsure whether he wanted to talk to the detectives or whether he needed an attorney, were not sufficient to constitute an invocation of his right to counsel and his right to remain silent. (People v. Crittenden (1994) 9 Cal.4th 83, 129-130.) We also reject his argument that the record compels the conclusion that he did not knowingly and voluntarily waive his rights. An express oral or written waiver, while not inevitably

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In this case, petitioner made incriminating statements to the police when he was first questioned at his parents' home. He was then transported to the police station and immediately given his Miranda warnings, whereupon he repeated his confession. Although this procedure appears to mirror the "two-step" procedure discussed in Seibert, there is no evidence in the record, and petitioner does not argue, that the police deliberately withheld the Miranda warnings at his parents' home in order to undermine Miranda, or that they employed the two-step tactic "to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Seibert, 542 U.S. at 611. There is also no substantial evidence that the midstream Miranda warning in this case failed to effectively apprise petitioner of his rights, Seibert, 542 U.S. at 616; Williams, 2006 WL 213852 at *1 (holding, in the context of a direct appeal from a federal criminal conviction, that a trial court must suppress post-warning confessions obtained during a deliberate two-step interrogation where the midstream Miranda warning, in light of the objective facts and circumstances, did not effectively apprise the suspect of his rights), or that the police questioning at the home of petitioner's parents was coercive or resulted in involuntary statements. Elstad, 470 U.S. at 318. In addition, as described above, and unlike the defendants in Seibert and Williams, petitioner was not "in custody" when he was questioned by police, either at his home or at the police station. For these reasons, the decision of the California Court of Appeal rejecting petitioner's claim is not contrary to or an unreasonable application of Seibert.

> sufficient, is strong proof of the validity of a waiver. (People v. Whitson (1998) 17 Cal.4th 229, 246.) Here, [petitioner] signed a written waiver and said he wanted to talk about the incident. The record is devoid of any indication that the detectives used physical or psychological pressure to elicit statements from [petitioner]. While the record reflects that [petitioner] was concerned about the consequences of his participation in the criminal enterprise and sought reassurance from the detectives, they steadfastly refused to give him express or implied promises of leniency.
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> Considering the totality of the circumstances, the trial court properly refused to suppress the evidence of [petitioner's] videotaped statements to the detectives.

(Opinion at 9-10.)

Petitioner argues that his statement, "Do I want to have a lawyer present? I mean, that's what I – it's like that's what I want to know" was an unequivocal request for counsel. He contends that because that request went unheeded, his confession should have been suppressed. This court disagrees. Petitioner's statements were ambiguous and did not constitute an unequivocal request for counsel. See Davis v. United States, 512 U.S. 452, 462 (1994) (finding that the statement, "[m]aybe I should talk to a lawyer," was ambiguous, and hence was not a request for counsel); Clark v. Murphy, 331 F.3d 1062, 1066 (9th Cir. 2003) (defendant's statement "I think I would like to talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning); United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994) (defendant's question, "Do I need a lawyer" or "Do you think I need a lawyer" does not "rise to the level of even an equivocal request for an attorney"); Diaz v. Senkowski, 76 F.3d 61, 63 (2d Cir.1996) (suspect's statement "[d]o you think I need a lawyer" was ambiguous within the meaning of Davis). The conclusion of the state appellate court to the same effect is not objectively unreasonable.

This court also agrees with the state court's finding that petitioner did not effectively invoke his right to remain silent. Petitioner directs the court's attention to his statements that he didn't want his statements "to come back to [him] in court" and that he didn't "want to go to jail over none of this." (Memo at 19-20.) This is insufficient to constitute a

request to terminate the interview. At no point did petitioner choose to remain silent by exercising his right to cut off questioning.

Petitioner further contends that his confession was not voluntarily obtained. Supreme Court precedent requires a court to determine the voluntariness of a statement based on "the totality of all the surrounding circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). "'No single criterion controls whether an accused's confession is voluntary.'" Nelson v. Walker, 121 F.3d 828, 833 (2d Cir. 1997) (quoting Green v. Scully, 850 F.2d 894, 901 (2d Cir.1988)). A confession is voluntary if it "is the product of an essentially free and unconstrained choice and involuntary if the product of a will overborne." Mancusi v. Clayton, 454 F.2d 454, 456 (2d Cir.1972) (citing Lynumn v. Illinois, 372 U.S. 528, 534 (1963)). A waiver of constitutional rights must be "made in full awareness of the nature of the right being waived and the consequences of waiving." Bautista, 145 F.3d at 1149. Factors to be considered include: the characteristics of the accused, such as his experience, background, and education; the conditions of the interrogation; and the conduct of the law enforcement officials, including whether there was physical abuse, a long period of restraint in handcuffs, use of psychologically coercive tactics, or trickery. See id.; Green, 850 F.2d at 901. Although not dispositive, "[a]n express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver." North Carolina v. Butler, 441 U.S. 369, 373 (1979).

The California Court of Appeal found petitioner's claim that his confession was involuntary to be without merit, and this Court agrees. Petitioner claims that the detectives "closed me off in an interrogation room and questioned me," ignored his requests for legal counsel, and "made me think I gave up my right to an attorney by talking to them at my parent's home." (Pet. at 5 & Attach. A.) He also states that he "did not understand that my statements to the detectives could be used against me and used to prosecute me," nor did he understand "the consequences of not having an attorney assist me." (Pet., attach. A.) The record belies

petitioner's assertion that he did not understand his statements could be used against him; he was specifically so advised and stated that he understood that advice. There was no indication of physical abuse, nor was petitioner handcuffed. There is no indication that the police intimidated, coerced or deceived petitioner at any stage of the interrogation. The officers advised petitioner repeatedly that they could make him no promises. Further, petitioner was read his rights shortly after he was brought into the room. He acknowledged those rights and waived them orally and in writing. Petitioner notes that immediately after he stated, "do I want to have a lawyer present?" one of the detectives reminded him that he had "talked to us already at your house." (Memo at 23.) Petitioner argues that this statement by the officer coerced him into waiving his rights "by improperly implying that petitioner had already waived these rights by talking to the detectives at his home." (Id. at 23-24.) This court disagrees that these statements constituted improper coercion. In addition, petitioner was specifically given an opportunity at that time to waive his rights and chose to do so. Based on the totality of the circumstances, this court concludes that petitioner voluntarily and knowingly waived his constitutional rights at the police interview. The decision of the state courts to the same effect is not contrary to United States Supreme Court authority and should not be set aside.

Even assuming arguendo that the trial court erred in admitting petitioner's statements to police, any error was harmless. "Erroneous admission of a confession does not constitute structural error." Williams, 2006 WL 213852 at *11 (citing Arizona v. Fulminante, 449 U.S. 279, 306-12 (1991). Accordingly, where an involuntary confession is improperly admitted at trial, a reviewing court must apply a harmless error analysis, assessing the error "in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 308. In the context of habeas review, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Henry v. Kernan, 197 F.3d 1021, 1029 (1999). The analysis must be conducted with an awareness that "a confession is like

no other evidence," and that "a full confession may have a 'profound impact' on the jury." Fulminante, 499 U.S. at 296. See also Henry, 197 F.3d at 1029-30.

One of the witnesses at petitioner's trial was Jessica Kiser, a friend of both petitioner and the victim, Hesterlee. Kiser testified that she called petitioner three days after the shooting and asked him what had happened. (RT at 231, 232.) Petitioner described essentially the same scenario that he told the police, except that he told Kiser he didn't know Garcia was going to bring a gun. (Id. at 232-41.) Tyrone Lane, a friend of both petitioner and Hesterlee, also testified at petitioner's trial. He testified that petitioner told him he "took [Hesterlee] there to get jacked, but I didn't mean for him to get killed, but he tried to be a hero, what was I supposed to do? (Id. at 246.)[5] Randy Bettencourt also testified at petitioner's trial, in a way that was largely favorable to petitioner. However, Bettencourt's previous statements to police, in which he implicated petitioner as the mastermind of an intended robbery of the victim, were played for the jury. In light of all of this testimony, petitioner's statements regarding his involvement in the crimes were largely superfluous and could not have had a "substantial" effect on the verdict.

For all of these reasons, petitioner is not entitled to relief on his claim that his federal constitutional rights were violated by the trial court's refusal to suppress his statements to police.

B. Jury Instructions

Petitioner claims that several jury instructions given at his trial misstated the law and precluded the jury from considering witness Randy Bettencourt's accomplice status and grant of immunity in evaluating his testimony. (Pet. at 5.) He argues that the errors violated his right to present a complete defense and to a fair trial because they precluded the jury from

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[5] Through the transcript of Bettencourt's statements to police, the jury was informed that a "jacking" could mean anything from a robbery to a theft, but that it usually meant a robbery "with a gun." (Clerk's Supplemental Transcript on Appeal at 82-84.)

considering evidence which would have cast doubt on Bettencourt's extrajudicial inculpatory statements.

Witness Randy Bettencourt gave conflicting stories to the police about his role in the killing of Hesterlee. As explained by the California Court of Appeal:

> Bettencourt drove Garcia's car to and from the scene of the crime. When questioned on the night of the crime, he claimed he thought Garcia was going to the park to sell some marijuana. Later, under a promise of immunity, he said that Garcia was going to "jack" the victim, that [petitioner] had set it up, and that [petitioner] was going to pretend he also was being robbed. At trial, Bettencourt retracted his earlier statement and claimed Garcia said he was going to the schoolyard to sell marijuana. However, the prosecutor introduced evidence that Bettencourt's testimonial recantation was motivated by fear of Garcia and his associates.

(Opinion at 19.) A review of the record reflects that Bettencourt testified he had been granted immunity and that he could not be prosecuted for anything he "may have done wrong" on the night of the crime. (RT at 39-40.) Bettencourt testified that his earlier statements to the effect that petitioner and Garcia were intending to rob Hesterlee were false; however, he did not have any explanation for why he would have made these false statements to the police. (Id. at 44-45, 85.) Bettencourt acknowledged that after he gave those earlier statements he was "shot at by somebody in San Francisco." (Id. at 47.) He also testified he was concerned about the safety of his family and that he had a fear of retaliation. (Id. at 85-86.) Bettencourt testified that he had earlier told the police "what they wanted to know" but that he was now telling the truth. (Id. at 91.) Mr. Bettencourt's earlier statements to the police, wherein he inculpated petitioner in the robbery, was played for the jury. (Id. at 66, 69, 72.) Also played for the jury were Bettencourt's statements to police given on the night of the crime, which corresponded to his trial testimony. (Id. at 75-76.)

Pursuant to California law:

> A criminal conviction cannot be based solely upon the testimony or extrajudicial statements of an accomplice. (Pen. Code, § 1111; People v. Rodrigues (1994) 8 Cal.4th 1060, 1133.) To support a

> conviction, accomplice testimony must be corroborated by other evidence tending to connect the accused to the commission of the offense. (Pen. Code, § 1111.) Corroborating evidence may be slight and entitled to little consideration when standing alone but, to be sufficient, it must tend to implicate the defendant in the commission of the crime independently of the testimony of the accomplice. (People v. Rodrigues, supra, 8 Cal.4th at p. 1128.) When the prosecution presents the testimony of an accomplice, the jury should be instructed to view such testimony with care and caution. (People v. Guiuan (1998) 18 Cal.4th 558, 569.) For these rules to apply, the defendant has the burden of establishing the witness's accomplice status by a preponderance of the evidence. (People v. Sully (1991) 53 Cal.3d 1195, 1228.)

(Opinion at 19-20.) Although the trial court did not instruct the jury that Bettencourt was an accomplice as a matter of law, it did give accomplice instructions. Those instructions, and petitioner's objections thereto, are the following.

The trial court orally instructed petitioner's jury pursuant to CALJIC No. 3.10 on the definition of an accomplice, stating as follows: "an accomplice is a person 'charged' who is subject to prosecution for the identical offense charged in Counts One and Two against the Defendant on trial by reason of aiding or abetting." (RT at 372-73.) However, the written version of this instruction provided to the jury stated, "an accomplice is a person who "is subject to prosecution" for the identical offense charged in Counts 1 and 2 against the defendant on trial by reason of aiding and abetting." (CT at 123.) Petitioner argues that both versions of CALJIC No. 3.10 given to his jury were incorrect. He notes that Bettencourt was not "charged" with anything and he was not "subject to prosecution" because he had been granted immunity. Petitioner contends that the incorrect wording of this instruction left his jury "with the erroneous impression that Bettencourt was not an accomplice." (Memo at 29, 30.)

Petitioner's jury was also instructed with CALJIC No. 2.27, which provides that:

> you should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all of the evidence upon which the proof of that fact depends.

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(RT at 369; CT at 110.) Petitioner argues that the language of this jury instruction conflicts with the state law requirement that accomplice testimony be corroborated. He contends that the instruction should have been given in a modified form "to contain an explicit reference to testimony requiring corroboration." (Memo at 30.)

Petitioner's jury was also given the written version of CALJIC No. 2.11.5, which provides:

> There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is on trial. There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

(CT at 103.) Petitioner argues that this jury instruction should not have been given because when a participant who is not prosecuted testifies at trial, the jury is entitled to consider lack of prosecution in assessing credibility.

The essence of petitioner's claim in the instant petition is that the cumulative effect of the jury instruction errors described above violated his rights to present a defense and to a fair trial because they failed to inform the jurors that they should view Bettencourt's exculpatory statements to police with caution. The California Court of Appeal rejected petitioner's arguments because petitioner could have suffered "no conceivable prejudice" from the instructions as given. (Opinion at 23.) The appellate court reasoned as follows:

> With respect to the requirement of corroboration of accomplice testimony, [petitioner] argues the requirement is such a fundamental principle of justice that error requires reversal unless it is harmless beyond a reasonable doubt. But this argument has been rejected by the Supreme Court. (People v. Frye (1998) 18 Cal.4th 894, 966.) A failure to instruct on corroboration of accomplice testimony will not require reversal if a review of the entire record reveals sufficient evidence of corroboration. (Ibid.) Corroboration may be slight and need only connect the defendant to the commission of the crime. (Ibid; Pen. Code § 1111.) Here, [petitioner's] statements to detectives (both at his home and in his

> videotaped interview), and his statements to two of his acquaintances when they confronted him about the crime, amply connect him to the commission of the crime; in fact, his connection to the crime was undisputed.
>
> Instructions advising the jurors to view accomplice testimony with care and caution do not derive from some obscure legal technicality, but are based on the logical assumption that an accomplice has greater motivation to lie than does an ordinary witness. (See People v. Gordon (1973) 10 Cal.3d 460, 469-471.) In assessing Bettencourt's credibility, it is not reasonably possible that the jury would fail to view his extrajudicial statements with care and caution. Although Bettencourt may not have actually been a principal in the robbery and murder, the evidence was sufficient to implicate him in the crimes and he made the statements implicating [petitioner] under a promise of immunity. At trial, he retracted those statements and claimed he had been lying during the interview. Although [petitioner] disagrees with the precise form of the instructions given here, they were sufficient to alert the jury to the factors that may cast doubt on an accomplice's testimony. Moreover, Bettencourt's statements that implicated [petitioner] added nothing to [petitioner's] own extrajudicial statements to multiple persons concerning his involvement in the crimes.
>
> Under the circumstances, there is no reasonable probability that a more favorable result to [petitioner] would have accrued from greater clarity in the accomplice instructions. (People v. Gordon, supra, 10 Cal.3d at p. 473.)

(Id. at 24-25.)

A challenge to jury instructions does not generally state a federal constitutional claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). Habeas corpus is unavailable for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at 1085; see also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986). However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir.

1980), cert. denied, 449 U.S. 922 (1980)); see also Lisenba v. California, 314 U.S. 219, 236 (1941).

In order to warrant federal habeas relief, a challenged jury instruction "cannot be merely 'undesirable, erroneous, or even "universally condemned,"' but must violate some due process right guaranteed by the fourteenth amendment." Prantil v. California, 843 F.2d 314, 317 (9th Cir. 1988), cert. denied, 488 U.S. 861 (1988) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). To prevail, the record must demonstrate that an erroneous instruction "'so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp, 414 U.S. at 147). The analysis for determining whether a trial is "so infected with unfairness" as to rise to the level of a due process violation is similar to the analysis used in determining, under Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), whether an error had "a substantial and injurious effect" on the outcome. See Thomas v. Hubbard, 273 F.3d 1164, 1179 (9th Cir. 2001), overruled on other grounds by Payton v. Woodford, 299 F.3d 815, 828 n.11 (9th Cir. 2002). In making its determination, this court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" Prantil, 843 F.2d at 817 (quoting Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir. 1984), cert. denied, 469 U.S. 838 (1984)). Further, in reviewing an allegedly ambiguous instruction, the court "must inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)). Petitioner's burden is "especially heavy" when the court fails to give an instruction. Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

Assuming arguendo that the California rules on accomplice testimony apply to Bettencourt, and assuming that the jury instructions on accomplice testimony were confusing or erroneous under California law, petitioner's trial was not rendered fundamentally unfair because of cumulative errors in the instructions given to his jury. The court first notes that Bettencourt's

trial testimony, which was consistent with his statements to police on the day of the murder, was favorable to petitioner. Bettencourt disavowed his earlier inculpatory statements and stated he was telling the truth at trial. In any event, for the reasons explained by the California Court of Appeal, petitioner's jury was fully apprised of the inconsistencies between the testimony given by Bettencourt at trial and his earlier statements to police, his motivation to fabricate, and the fact that he was granted immunity from prosecution when he made the extrajudicial inculpatory statements. Petitioner's jury was also instructed pursuant to CALJIC No. 2.20 that they were entitled to consider anything that had a tendency to prove or disprove the truthfulness of a witness's testimony, including "the existence of nonexistence of a bias, interest, or other motive," and "a statement made by the witness that is inconsistent with his testimony." (CT at 105-06.) Petitioner's jury was also instructed that a witness who was willfully false in one material part of his testimony was to be distrusted in other parts and that they could reject the entire testimony of a witness who willfully had testified falsely as to a material point. (Id. at 108.) In short, petitioner's jury was given adequate information to alert them to view Bettencourt's damaging statements with caution. To the extent that petitioner's defense rested on pointing out the weaknesses in Bettencourt's extrajudicial statements, the events at trial adequately supported that defense tactic. In any event, as noted by the California Court of Appeal, Bettencourt's extrajudicial statements were essentially cumulative of petitioner's damaging statements to his friends and to the police. The testimony of Bettencourt, assuming he was an accomplice, was not the only evidence connecting petitioner to the murder of Hesterlee.

The conclusion of the California Court of Appeal that any jury instruction errors regarding the evaluation of accomplice testimony at petitioner's trial did not rise to the level of a federal due process violation is not contrary to or an unreasonable application of United States Supreme Court authority. Accordingly, petitioner is not entitled to relief on his claims of jury instruction error.

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For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 6, 2006.

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